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No. 80-97.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

FRANCIS J. BURNS,
PETITIONER,

v.

JAMES LEO SULLIVAN ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the Court of Appeals for the First Circuit, in interpreting Massachusetts law, correctly affirmed the decision of the district court that petitioner had no property interest in becoming a police sergeant which was entitled to constitutional protection.

2. Whether the Court of Appeals for the First Circuit, in interpreting Massachusetts law, correctly ruled that petitioner's racial discrimination claim under 42 U.S.C. §§ 1983, 1985(3) was barred by the six-month statute of limitations set forth in Mass. G.L. c. 151B, § 5.

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Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 473 F. Supp. 626 (D. Mass. 1979) and is set forth in pages 1a-22a of the Appendix to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the First Circuit is reported at 619 F.2d 99 (1st Cir. 1980) and is set forth in pages 23a-38a of the Appendix to the Petition for a Writ of Certiorari.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on March 31, 1980. By order dated April 25, 1980, the Court of Appeals denied petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant provisions of 42 U.S.C. §§ 1983 and 1985(3); Mass. G.L. c. 31, § 15, ¶ C (now codified at c. 31, § 27); Mass. G.L. c. 151B, § 5; Mass. G.L. c. 260, § 2A, are included in the Appendix to the petition.

The relevant provisions of Mass. G.L. c. 31, §§ 2(b) and 46A (now codified at c. 31, §§ 2[b] and 42, respectively); Mass. G.L. c. 151B, § 4, cl. 1; Mass. G.L. c. 151B, § 9, are included in the Appendix annexed hereto.

Prior Proceedings.

On June 30, 1978, petitioner filed a complaint in the United States District Court for the District of Massachusetts alleging that his failure to be promoted to the position of police sergeant within the City of Cambridge Police Department in July of 1975, deprived him of due process of law, was based upon his race (white) and therefore denied him equal protection of the laws; and was in retaliation for exercising his First Amendment rights. The city manager of the City of Cambridge, the respondent James L. Sullivan, was named as a defendant in

petitioner's complaint. In addition, petitioner's complaint alleged that a city councillor, the respondent Walter J. Sullivan (no relation to the city manager), violated his First Amendment rights because of certain advice sought by petitioner and received from the city councillor.

Respondents' motion to dismiss petitioner's complaint was supported by their affidavits, and by deposition excerpts including deposition testimony of petitioner. Treating respondents' motion as one for summary judgment, the district court rejected petitioner's claims on their merits and entered judgment for respondents. Specifically, the district court ruled that petitioner had no property interest in the sergeant promotional process triggering constitutional safeguards; that petitioner was not denied equal protection of the laws because his race could not have been the basis for his non-promotion since the officer ranked lowest on the civil service eligible list who was promoted to the rank of sergeant was white; that petitioner's claim that he was not promoted because of his exercise of free speech was pure "conjecture and not supported by evidence" (Appendix to petition, p. 19a); and that petitioner had "no evidence" that City Councillor Walter J. Sullivan had acted to deprive him of any First Amendment right (Appendix to petition, p. 22a).

In appealing to the United States Court of Appeals for the First Circuit, petitioner did not challenge the district court's decision rejecting his claim that he was not promoted due to his exercise of First Amendment rights. The Court of Appeals affirmed the district court's decision that Massachusetts law did not confer upon plaintiff any property interest in becoming a sergeant which was entitled to constitutional protection. The Court of Appeals chose not to reach the merits of petitioner's equal protection claim and instead affirmed the district court's judgment on the alternative ground, argued consistently by respondents, that petitioner's racial discrimination

claim was barred by the six-month statute of limitations set forth in Mass. G.L. c. 151B, § 5. Finally, the Court of Appeals ruled that petitioner's First Amendment claims against the respondent city councillor were "without a scintilla of merit." (Appendix to petition, p. 37a.)

In seeking review in this Court, petitioner's constitutional claims have been winnowed to two, namely his due process and equal protection claims.

Statement of the Case.

On October 27, 1973, the Division of Civil Service of the Commonwealth of Massachusetts conducted an examination for promotion to the rank of sergeant within the Cambridge Police Department. In April of 1974, the then director of the Massachusetts Division of Civil Service, established an eligible list for promotion to sergeant consisting of the seventy-three officers who had ranked highest on the examination. Petitioner, a white male, was positioned number 9 on the list.

In July of 1974, five black patrol officers in the Cambridge Police Department, including four on the sergeant eligible list, brought suit in the United States District Court for the District of Massachusetts alleging that Cambridge Police Department promotional policies and practices discriminated against them on the basis of race, citing, among other things, the fact that in the history of the department, only one black patrol officer had been promoted to a supervisory position. *Kantor* v. *Sullivan*, Civ. Action No. 74-2662-T. The *Kantor* suit was resolved by a consent decree which provided for the promotion of twenty-eight police officers to the rank of sergeant. Petitioner, a party to that suit, was represented by counsel and signed the consent decree.

On June 13, 1975, Cambridge Chief of Police, Francis A. Pisani (who became deceased prior to this action and is not a party to this case), requested the Director of Civil Service to certify a sufficient number of names of eligible police officers to fill twenty-eight sergeant vacancies. The director, pursuant to civil service law, furnished Chief Pisani with a certified eligible list containing the names of the forty police officers who had scored highest on the sergeant promotional examination. Instructions accompanying the eligible list authorized Chief Pisani to interview "proposed appointees," and to submit the names of those persons nominated for promotion to the director for approval.

Chief Pisani interviewed the forty police officers whose names appeared on the civil service eligible list, and rated each for attitude and loyalty, judgment, supervisory and leadership, technical skills and initiative/resourcefulness. The utilization of these criteria was recommended by the International Association of Chiefs of Police (IACP) which in the late Fall of 1974 had conducted a study highly critical of the Cambridge Police Department. The IACP report had condemned the department's "abdication" of promotional testing responsibility to the State Civil Service Commission, and had recommended that oral interviews become an important part of the promotional process.

The petitioner's oral interview ranking was 37th out of the 40 eligible officers. This evaluation was consistent with petitioner's being rated 22nd out of 25 by a review board, in April of 1975, which evaluated detective applicants for such qualities as attitude, job knowledge, and job potential.

Following the oral interview process, Chief Pisani submitted to the respondent City Manager, James L. Sullivan, the names of twenty-eight police officers, including three black officers, for promotion to the rank of sergeant. The city manager ratified Chief Pisani's selections for nomination. Chief Pisani

and the city manager then submitted the twenty-eight names to the personnel administrator (succeeding the civil service director) of the Commonwealth[1] for his approval. Twenty-five of the police officers' names submitted for the personnel administrator's approval were not ranked highest on the eligible list. The reasons for nominating for promotion twenty-five police officers who were not placed highest on the eligible list were that these police officers were "better qualified." Petitioner and the officers listed fourth and fifth on the eligible list were not among the twenty-eight officers submitted to the personnel administrator for sergeant promotion approval. In early July of 1975, the personnel administrator, exercising his independent functions and authority under Massachusetts Civil Service Law, approved both the nominations of Chief Pisani which had been ratified by City Manager Sullivan, and the reasons stated for nomination of individuals not listed highest on the eligible list.

A co-counsel for the plaintiffs in *Kantor* v. *Sullivan*, prior to the signing of the consent decree in that case, understood that three of his clients would be promoted, but was unable to identify any person(s) who informed him the three promotions would take place, and acknowledged that his understanding was not based upon first-hand knowledge, but rather was derived from a hearsay source. The attorney in the *Kantor* case did depose, unequivocally, that he had neither an understanding with nor commitment from the respondent city manager or respondent city councillor concerning the promotion of his clients. He further deposed that he had no knowledge, personal or indirect, that the city manager was aware of

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[1] Pursuant to Mass. Stat. 1974, c. 835, the position of director and the Division of Civil Service were abolished and all duties formerly delegated to the director, including the establishment of eligible lists and approval of appointments and promotions to civil service positions, were transferred to a newly created position of personnel administrator for the Commonwealth.

any commitment to nominate his clients for promotion. In this regard, the attorney's sworn testimony was identical to that of the city manager who deposed that he never agreed to nominate black patrolmen for promotion to the rank of sergeant as part of a pre-consent decree commitment in connection with the *Kantor* case.

Petitioner had an absolute right to appeal his failure to be promoted pursuant to State Civil Service Law. Had he pursued such an appeal, petitioner would have been entitled to an adjudicatory type hearing before the Civil Service Commission wherein he could have challenged both his failure to be promoted and the reasons for promoting persons ranked lower than himself on the civil service eligible list. However, petitioner never exercised his right to appeal his failure to be promoted to the position of sergeant.

Argument.

The Petition Presents no Substantial Question Warranting Further Review by this Court.

The decision of the Court of Appeals is clearly correct and presents no reason for further review in this Court. Petitioner's remaining constitutional claims derive no support from the uncontroverted sworn testimony comprising the record in this case and are foreclosed by decisions of this Court. Petitioner's due process claim is frivolous in view of uniform decisional law holding that placement on a Massachusetts civil service eligibility list creates no property interest entitled to constitutional protection. Petitioner's equal protection claim was properly dismissed by the Court of Appeals on statute of limitations grounds. The conflict among circuit court decisions perceived by petitioner on the statute of limitations issue is illusory given

the express and distinct language of pertinent Massachusetts statutes and their construction by the Supreme Judicial Court of Massachusetts. Moreover, the Court of Appeals' analysis of the statute of limitations issue is consistent with this Court's methodological approach most recently set forth in *Board of Regents of the University of the State of New York* v. *Tomanio*, ____ U.S. ____, 100 S. Ct. 1790 (decided May 19, 1980).

PETITIONER'S DUE PROCESS CLAIM.

Any property interest of petitioner which is entitled to due process protection is "created and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Petitioner possessed no entitlement to promotion triggering due process requirements by virtue of his name appearing on a civil service eligible list, whatever the rank. It has always been the law in Massachusetts that "[a]n appointing authority is free to choose a certified applicant other than the one at the top of the list if a statement of reasons is filed with the director. [Mass.] G.L. c. 31, § 15, par. C."[2] *Milton* v. *Civil Service Commission*, 365 Mass. 368, 374, 312 N.E.2d 188, 193 (1974); *Evans* v. *Town of Watertown*, 417 F. Supp. 908, 912 (D. Mass. 1976); *Carey* v. *Weaver*, Civil Action No. 78-2669-Z (D. Mass. 10/15/79) (unreported decision, slip op. at 2) ("As applicants for patrolmen positions, [plaintiffs] have no . . . interest [protectible under the due process clause]"). *See also*, *Bishop* v. *Wood*, 426 U.S. 341, 345 (1976).

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[2] Massachusetts General Laws c. 31, § 15, ¶ C, is now codified at Mass. G.L. c. 31, § 27. References in this brief to sections of Mass. G.L. c. 31, will be to the sections as they were prior to recodification. Such was the approach adopted by the Court of Appeals.

In his complaint filed in the district court (and in his petition) petitioner has conceded that the "statement [required by Mass. G.L. c. 31, § 15, ¶ C] was filed pursuant to law." Notwithstanding this concession in his complaint, petitioner claims that he was deprived of due process because the words "better qualified" as used by the appointing authority did not constitute a sufficient statement of reasons within the meaning of Mass. G.L. c. 31, § 15, ¶ C, for promoting officers ranked below him on the civil service eligibility list. The district court ruled that "[w]hether or not the requirements of Mass. Gen. Laws ch. 31, §15C were satisfied by the words 'better qualified' is a question of state law without federal significance." 473 F. Supp. at 631, n.7 (Appendix to petition, p. 19a). The Court of Appeals declined to address the sufficiency of reasons for promoting persons not ranked highest on the eligible list having concluded that petitioner lacked any property interest entitled to constitutional protection. 619 F.2d at 104-5 (Appendix to petition, p. 31a).

Petitioner's claimed due process violation presents, as the district court held, a pure state law question. "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." *Slotnick* v. *Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Moreover, state law expressly afforded petitioner an absolute right to appeal his failure to be promoted and to challenge the reasons for the appointing authority's selection of the twenty-five police officers whose names did not appear highest on the civil service eligible list. Mass. G.L. c. 31, § 2(b). *Goldblatt* v. *Corporation Counsel*, 360 Mass. 660, 662, 277 N.E.2d 273, 277 (1971); *Reidy* v. *Acting Director of Civil Service*, 354 Mass. 760, 236 N.E.2d 88 (1968). Thus, state law provided petitioner an opportunity for a trial-type adjudicatory hearing, thereby affording him any and every conceivable due process protection

to which he could claim entitlement. Petitioner's failure to pursue the safeguards afforded by state statute does not translate the claims he could have raised in state forums into constitutional questions.[3]

Petitioner claims that the decision of the Court of Appeals conflicts with this Court's decision in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). Such a contention cannot withstand analysis. In *Horowitz*, this Court rejected the procedural due process claims of a student dismissed from medical school for academic reasons, and without deciding whether the student had a substantive right to be free from an allegedly arbitrary dismissal decision, concluded that her dismissal had not been arbitrary. In assessing what process was due the dismissed student, this Court specifically "warn[ed] against any . . . judicial intrusion into academic decision making." *Id.* at 92.

Rather than support petitioner's position, the measured due process analysis by this Court in *Horowitz* reveals its bankruptcy. In *Horowitz*, this Court was properly reluctant to fashion a substantive right to be free from an allegedly arbitrary decision in an area involving specialized, discretionary, and, in part, subjective evaluations of academic performance. In declining petitioner's invitation to review and resolve the appropriateness of forty promotional decisions, and to assess

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[3] In his brief to the Court of Appeals for the First Circuit, the personnel administrator for the Division of Personnel Administration for the Commonwealth, a nominal defendant in this case, concurred with respondents that petitioner "overstated both the scope of [Mass. G.L. c. 31, § 15, ¶ C] and its significance to the issues before [the] Court." Moreover, to assist the Court of Appeals in evaluating the scope of Mass. G.L. c. 31, § 15, ¶ C, the personnel administrator noted that "[a]t the time when Cambridge submitted its statement of reasons in this case, the Personnel Administrator, consistent with [the] legislative policy of permitting municipalities to exercise discretion in the promotion process, routinely accepted statements of reasons which indicated that the person selected was better qualified."

the relative attributes and qualifications of the candidates, both courts below heeded this Court's warning in *Horowitz* by recognizing the wide discretion possessed by appointing authorities when making promotional decisions, and by following this Court's express directive that federal courts are not to involve themselves in assessing the merits and demerits of personnel decisions made by public agencies. *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976); 619 F.2d at 99 (Appendix to petition, pp. 35a-36a); 473 F. Supp. at 631 (Appendix to petition, p. 20a). Petitioner simply ignores this Court's consistent admonitions that the federal courts are ~~an~~ inappropriate forum to resolve assessments in areas involving such matters as academic performance and personnel qualifications.[4]

Aside from the prudential considerations articulated by this Court, petitioner in this case cannot possess any substantive due process right where, as noted above, he possesses no property interest which would entitle him to procedural due process safeguards. *Cf. Horowitz*, where this Court assumed that the petitioner possessed a property interest. 435 U.S. at 84-5. Moreover, respondents submit that the inappropriateness of fashioning the substantive due process right to be free from an allegedly arbitrary decision claimed to exist by petitioner, is self-evident where as here, petitioner declined to pursue the state statutory procedures whereby he could have tested the alleged arbitrariness of the decision not to promote him.

Petitioner's due process claim does not give rise to a substantial constitutional question let alone a question warranting this Court's further review. Decisions of the Supreme Judicial Court of Massachusetts and of federal courts interpreting Massachusetts law uniformly hold that petitioner did not have a

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[4] Petitioner's claim that his failure to be promoted represented an arbitrary decision is rebutted by the record in this case which reveals that plaintiff was evaluated by four superior officers as lacking in such qualities essential to the supervisory position of sergeant as attitude, judgment, and leadership.

property interest with respect to sergeant promotions which is entitled to constitutional protection. In assessing petitioner's due process claim, both courts below gave proper deference to appointing authority discretion in making promotions, and to this Court's stated concern that federal courts should not sit as super personnel boards to resolve public employment personnel disputes.

Petitioner's Equal Protection Claim.

Petitioner's equal protection claim is premised upon his assertion that he was discriminated against on the basis of race with respect to his failure to be promoted to sergeant. The Court of Appeals determined that petitioner's claim was time barred by the six-month limitation period set forth in Mass. G.L. c. 151B, § 5, the state statute prescribing the cause of action "most analogous" to petitioner's racial discrimination allegation. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). This issue was never briefed by petitioner in the Court of Appeals (Appendix to petition, p. 41a).

Massachusetts General Laws c. 151B, § 4, cl. 1 makes it an unlawful practice for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment because of the individual's race or color. The Massachusetts Supreme Judicial Court has expressly stated "that the clear purpose of [Mass.] G.L. c. 151B is to implement the right to equal treatment guaranteed to all citizens by the *constitutions of the United States* and the Commonwealth. . . ." *Katz* v. *Massachusetts Commission Against Discrimination*, 365 Mass. 357, 366, 312 N.E.2d 182, 187 (1974) (emphasis added). Section 5 of the statute requires that any complaint seeking to redress an unlawful discriminatory practice

"must be . . . filed within six months after the alleged act of discrimination" with the Massachusetts Commission Against Discrimination (MCAD). As a condition precedent to obtaining any judicial consideration of a racial discrimination claim, with respect to public employment, a complainant must present the complaint to the MCAD within the required six months. *East Chop Tennis Club* v. *Massachusetts Commission Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973). Indeed, a contention or objection by a party to MCAD proceedings that is not first presented to the commission cannot be advanced in court absent extraordinary circumstances. *Katz* v. *Massachusetts Commission Against Discrimination*, 365 Mass. 357, 364, 312 N.E.2d 182, 186 (1974) (construing Mass. G.L. c. 151B, § 6).

The express language of Mass. G.L. c. 151B, and the foregoing judicial precedents establish that under Massachusetts law, petitioner's equal protection claim alleging racial discrimination with respect to public employment, falls squarely within the purview of Mass. G.L. c. 151B, § 4, cl. 1 and would have to be raised by petitioner within the six-month time period specified in § 5 of the statute for the claim to be heard in state court. The Supreme Judicial Court of Massachusetts has expressly affirmed that petitioner's identical claim, namely a claim of racial discrimination with respect to sergeant promotions, is properly pursued under Mass. G.L. c. 151B, § 4, cl. 1. *Springfield Board of Police Commissioners* v. *Massachusetts Commission Against Discrimination*, Mass. Adv. Sh. (1978) 1160, 375 N.E.2d 710.

Petitioner argues that Mass. G.L. c. 151B, is not "most analogous" with respect to his racial discrimination claim because it is not necessary to allege state action under the statute, and the statute provides for conciliation by the MCAD. Petitioner's arguments are misplaced. That Mass. G.L. c. 151B, affords a remedy that is not limited to employment discrimina-

tion by governing authorities, does not mean that the statute does not apply (or should not be applied) to claims of discrimination in public employment.[5] Secondly, the conciliation procedures built into Mass. G.L. c. 151B, do not derogate from the requirement in § 5 of the statute that a complainant must articulate and present his/her racial discrimination claim within six months as a precondition to obtaining judicial consideration of the claim.[6]

Petitioner claims that the six-month limitation period set forth in Mass. G.L. c. 151B, may not be appropriately applied to causes of action alleged to arise under 42 U.S.C. §§ 1983 and 1985. In support of this contention petitioner essentially argues that other courts of appeals in interpreting the laws of other states, have declined to apply statutes of limitations involving administrative tribunals.

In interpreting the laws of other states, courts of appeals have declined to apply limitation periods pertaining to the fil-

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[5] Respondents note that common law torts need not invovle state action. Yet petitioner does not suggest that the tort statute of limitations which he claims to be applicable to his racial discrimination claim, should not apply for that reason.

[6] The Court of Appeals correctly rejected application of Massachusetts' general tort statute of limitations to petitioner's racial discrimination claim. Massachusetts G.L. c. 260, § 2A. That statute, on its face, is applicable to conventional, common law torts. 619 F.2d at 107 (Appendix to petition, p. 36a). Significantly, petitioner fails to identify what, if any, tort his cause of action is most analogous to, and offers no argument whatsoever as to why Massachusetts' tort statute of limitations is "most analogous" to his discrimination claim. These omissions are not surprising in view of the express language of Mass. G.L. c. 151B, § 4, cl. 1, and the well-settled proposition that constitutional claims arising under § 1983 cannot be equated routinely with common law torts for which redress may be sought in a state court. *Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). For a criticism of simplistic contract and tort analogies to civil rights actions in connection with statute of limitations issues, see Note, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97, 117-121 (1977) [hereinafter cited as Note, *supra* note 6, at].

ing of complaints with administrative agencies, and have instead chosen to apply other "most analogous" and specific state statutory limitation periods governing actions arising under a federal statute,[7] actions arising under a liability created by statute[8] or by the doing of an official act,[9] or actions for which no specific state limitation period is set forth.[10] For a compilation of cases and the approaches to statute of limitations issues adopted by courts of appeals, see Note, *supra* note 6, at 121-126 nn. 178, 190, 198; *Beard* v. *Robinson*, 563 F.2d 331, 337 n.7 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978).

By contrast, Massachusetts has no statute establishing a limitation period for actions arising under a federal statute specifically, or for actions arising under statutes generally. In addition, no Massachusetts law, in catch-all fashion, prescribes a limitation period for actions for which no limitation period is

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[7] *Zuniga* v. *AMFAC Foods, Inc.*, 580 F.2d 380, 384-5 (10th Cir. 1978) (applying Colorado statute of limitations applicable to "actions under federal statutes"); *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 228 (8th Cir. 1976) (applying Nebraska statute of limitations applicable to "[a]ll actions upon a liability created by a federal statute . . .").

[8] *Garner* v. *Stephens*, 460 F.2d 1144, 1148 (6th Cir. 1972) (applying Kentucky statute of limitations applicable to "[a]n action upon a liability created by statute when no other time is fixed by the statute creating the liability".); *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520, 521-2 (6th Cir. 1975) (applying Ohio statute of limitations applicable to "an action . . . upon a liability created by statute . . .").

[9] *Green* v. *Ten Eyck*, 572 F.2d 1233, 1239 (8th Cir. 1978) (applying Missouri statute of limitations for actions against a public official "upon a liability incurred by the doing of an act in his official capacity and in virtue of his office . . .").

[10] *Shouse* v. *Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) (applying Washington statute of limitations applicable to actions "for any other injury to the person or rights of another not hereinafter enumerated . . ."); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 488 (7th Cir. 1970), cert. denied *sub nom.*, *International Harvester Co.* v. *Waters*, 400 U.S. 911 (1970) (applying Illinois statute of limitations governing civil actions for which a limitation not otherwise provided).

set forth. For these reasons, the conflict alleged by petitioner to exist between the decisions of other circuits and the Court of Appeals' decision in this case is non-existent. The Court of Appeals' decision is not in conflict with but is *different* from the decisions in other circuits, which is as it should be given the clear differences between Massachusetts' statutes and those of other jursidictions. As noted below, such differences are *per force* to be expected given this Court's direction that federal courts are to look to the particular law of each state to determine the "most analogous" limitation period to apply. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976). That courts of appeals may conflict on questions of state law is not itself a reason for granting a writ of certiorari. *See, e.g., Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

The decisions in other circuits do not conflict with the decision of the Court of Appeals not only because of different states' statutory schemes, but also because the reasoning of other circuits' decisions cannot be applied to Massachusetts law. For example, in *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 226 (8th Cir. 1976) a representative case most strongly relied upon by petitioner, the court declined to apply an administrative statute of limitations because the limitation did not relate to the filing of an action in state court: "The 180 day period contained in the Nebraska F.E.P.A. . . . is not a limitation upon the filing of a civil action. . . ." In contrast, as noted above, both the express language of Mass. G.L. c. 151B, and the construction of the statute by the Supreme Judicial Court of Massachusetts, make clear that adherence to the six-month limitation period in Mass. G.L. c. 151B, § 5, is a jurisdictional precondition to pursuing discrimination claims in state court.[11] And in fact where a 180 day adminis-

[11] If a complainant files a complaint with the MCAD within the mandatory six-month requirement, s/he may, within ninety days of the filing, com-

trative limitation period governed the filing of a state court civil action involving racial discrimination in housing, the Court of Appeals for the Eighth Circuit applied the limitation. *Warren* v. *Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975), *cert. denied*, 423 U.S. 855 (1975). *Accord, Green* v. *Ten Eyck*, 572 F.2d 1233, 1237-8 (8th Cir. 1978).[12]

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mence an independent action in state court. "No action under this section shall be filed [in state court] later than two years after the alleged unlawful practice [*e.g.*, of discrimination] occurred." Mass. G.L. c. 151B, § 9. Even if the explicit six-month jurisdictional statute may be properly disregarded and the two-year period in § 9 of the statute applied, petitioner's complaint would still be time barred.

[12] Petitioner's perceived conflict between the decision of the Court of Appeals for the First Circuit and decisions of other courts of appeals assumes that the state laws discussed in the various decisions are fungible. Such an assumption is erroneous. Examples from the jurisdictions which were the subject of the decisions relied upon by petitioner at pp. 20-21 of his petition, illustrate the error. In contrast to Massachusetts law, the filing of a complaint with the Kentucky Commission on Human Rights is not a prerequisite to seeking court redress for perceived racial discrimination since under Ken. Rev. Stat. § 344:450 a person considering himself the subject of a discriminatory act "shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter." Ky. Rev. Stat. chapter 344. Similarly, the State of Washington's pertinent employment discrimination statute, Wash. Rev. Code § 49.60.020, although not considered in *Shouse* v. *Pierce*, 559 F.2d 1142 (9th Cir. 1977), provides that nothing in the act "shall . . . be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights." The stated purpose of Mass. G.L. c. 151B, to secure federal constitutional rights cannot be analogized to Colorado law which provides in part that "[n]othing in parts 3 [Colorado Civil Rights Division — Commission — Procedures] to 8 of this article shall be construed to authorize the commission, the director, or the division to enforce any provision of federal law." Col. Rev. Stat. § 24-34-308 (1979). Similarly, the pertinent Massachusetts statute cannot be meaningfully compared to Missouri law since that state's Commission on Human Rights does not appear to have any authority to vindicate federal constitutional rights in specific cases, but instead is merely authorized "[t]o receive

In summary, the conflict perceived by petitioner to exist between decisions of the courts of appeals is nonexistent. Decisions in other circuits have applied "most analogous" statutes of limitations that have no analogue under Massachusetts law. In this case, the Court of Appeals for the First Circuit applied the limitation period set forth in a statute that by its express terms, and as construed by the Supreme Judicial Court of Massachusetts, governs the bringing of racial discrimination claims, such as that advanced by petitioner, in state court.

It remains to consider whether a six-month limitation period applicable to racial discrimination claims arising in the course of public employment, is "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975), cited in *Board of Regents of the University of the State of New York* v. *Tomanio, supra*, 100 S. Ct. at 1795. Petitioner objects to the six-month requirement with the predictable cavil that it does not permit sufficient time for a plaintiff to file a § 1983 claim.

In assessing the consistency of Massachusetts' six-month limitation period with federal policies underlying § 1983, this Court's decision in *Board of Regents of the University of the State of New York* v. *Tomanio, supra*, provides the appropriate frame of reference for purposes of analysis. In *Tomanio*, this Court held that a state's tolling rule should apply to a § 1983 action, and rejected the proposition that federal courts were free to reject state tolling statutes based upon perceived policies of federalism. In so holding, this Court affirmed its

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and investigate complaints of discrimination and to recommend ways of eliminating any injustice occasioned thereby. . . ." Mo. Ann. Stat. § 213.030(3) (Vernon). In addition, the pertinent Ohio statute, in contrast to Massachusetts law, does not authorize the awarding of compensatory damages. *Ohio Civil Rights Commission* v. *Lysyj*, 38 Ohio St. 2d 217, 222, 67 Ohio Opinions 2d 287, 290, 313 N.E.2d 3, 7 (1974).

oft-stated holdings that the borrowing of a state limitation period embodies reliance on the state's wisdom in setting the limit, and that a goal of national uniformity on statutes of limitations, however appealing based upon perceived notions of federalism, must give way to the specific requirements of each state's laws. 100 S. Ct. at 1795-1797.

The Court of Appeals' conclusion that application of Massachusetts' six-month limitation period to claims of racial discrimination in public employment "conflicts with no federal policy," cannot be seriously challenged. The six-month rule does not discriminate against federal plaintiffs but rather imposes a time requirement uniformly applicable to entry into both federal and state forums. *See generally*, Note, *supra*, note 6, at 133-141. Secondly, as the Court of Appeals noted, Massachusetts' six-month requirement, as a *per se* rule, is reasonable since it is identical to the limitation period governing racial discrimination claims of federal and state employees pursuant to 42 U.S.C. § 2000e-5(e) (Title VII of the Civil Rights Act of 1964). Third, the Court of Appeals correctly observed that Massachusetts' six-month rule did not overly burden a § 1983 plaintiff since the Federal Rules of Civil Procedure liberally afford a plaintiff an opportunity to develop a case notwithstanding that the plaintiff might dimly perceive his/her constitutional claims at the time of initiating suit. *See, e.g.*, Fed.R.Civ.P. 15 (amendment of complaints); Fed.R. Civ.P. 56(f) (affidavit certifying need for further discovery to oppose motion for summary judgment). It is neither unreasonable nor burdensome to require a plaintiff, obligated to "set forth the particulars" of any alleged unlawful act of discrimination within six months under Mass. G.L. c. 151B, § 5, to set forth any such "particulars" within an identical time in a federal forum.

In addition to the foregoing, the Court of Appeals gave recognition to the express intent of the Massachusetts legislature

that personnel disputes arising under the Massachusetts' civil service system be resolved within six months. 619 F.2d at 107 (Appendix to petition, p. 37a). Mass. G.L. c. 31, § 46A (now codified at Mass. G.L. c. 31, § 42) requires that where a civil servant seeks direct judicial review by writ of mandamus of action taken by his immediate appointing authority, s/he must do so within six months of that action. Legislative history reveals the policy considerations underlying the prescribed period to initiate judicial review:

> "The Committee further recommends that a time limitation of six months be set for the bringing of an action for reinstatement in any court by any person who claims that his removal from service is illegal. . . . The Committee feels that a period of six months is all that should be allowed for bringing of such an action, in justice to the taxpayers of any city or town."

Brooks v. *Registrar of Motor Vehicles*, 1 Mass. App. Ct. 78, 80, 294 N.E.2d 487, 488 (1973), quoting from Report of Joint Special Committee on Civil Service Laws, Rules and Regulations, 1930 House Doc. No. 1001, p. 9. Thus, Massachusetts' six-month rule is not only supported by the traditional policies of repose inherent in any statute of limitations, but also is supported by Massachusetts' long-established policy that personnel disputes in public employment be promptly resolved.

The "wisdom" of Massachusetts' six-month rule is unexceptionable. The policies of deterrence and compensation embodied in § 1983 are not affected by Massachusetts' six-month limitation, since plaintiffs can enforce their claims by suing within the six-month period. *See, Tomanio, supra,* 100 S. Ct. at 1797. Indeed, petitioner's failure to specifically identify the policies of deterrence and compensation, underscores that the

real gravamen of his objection to the six-month limitation is that it caused him to lose his case. Such a complaint, as this Court has noted, is without merit. *Robertson* v. *Wegmann*, 436 U.S. 584, 593 (1978).

Petitioner argues for the first time in his petition to this Court that the Court of Appeals' decision on the governing statute of limitations should not be applied retroactively to his complaint, since to do so, petitioner contends, would conflict with this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Even assuming for the sake of argument that petitioner properly may advance this contention for the first time to this Court,[13] his reliance on *Chevron Oil* is misplaced.

As a preliminary matter, it should be emphasized that the prospective-only application of a judicial decision for which petitioner argues is clearly the exception to the general and "traditional view . . . that decisions overruling prior holdings or announcing novel doctrine must be applied to all subsequent cases, even if the later cases involve incidents that took place before the crucial judicial ruling." *Zweibon* v. *Mitchell*,

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[13] Respondents submit that petitioner should have first presented his argument for prospective-only application of the statute of limitations decision to the Court of Appeals, and that his failure to do so precludes consideration of the argument by this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." [Citations omitted.] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Such abstention is particularly appropriate with respect to an issue such as retroactivity, for which the guidelines set forth by this Court in *Chevron Oil* require the making of policy determinations and equitable judgments which the court announcing the "new" rule is best equipped to make in the first instance. *See United States* v. *Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976). This is especially true when the "retroactive" application sought to be avoided is to the case in which the decision was announced. In any event, there can be no conflict, for purposes of this petition, between the Court of Appeals' decision and this Court's holding in *Chevron Oil* where the court of appeals was never presented with, never considered, and never resolved the retroactivity question which *Chevron Oil*'s holding decided.

606 F.2d 1172, 1175 (D.C. Cir. 1979) (quoting, at note 10, from *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting): "'Judicial decisions have had retrospective operation for near a thousand years.'"). Accordingly, in seeking the exceptional protection of nonretrospective application of a decision, petitioner "bears the burden of proving that such limited application is justified. . . . *All three of the factors* listed in *Chevron Oil* must be shown to favor prospective-only application before a decision will be denied retroactive effect." *Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288-1289 (7th Cir. 1980) (citations omitted) (emphasis added).

Most significantly, petitioner has failed to show the existence in this case of the fundamental consideration underlying this Court's analysis in *Chevron Oil*, namely that the Court of Appeals' decision established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Chevron Oil Co.* v. *Huson*, *supra* at 106. On the contrary, the Court of Appeals did not establish a "new principle of law;" rather, it merely applied the "now well established" principle that the federal courts will apply to a § 1983 action the statute of limitations "which the state would enforce" in its own courts in an action "'most analogous' to the particular civil rights cause of action. . . ." 619 F.2d at 105 (Appendix to petition, p. 32a.)

More specifically, the Court of Appeals did not overrule clear past precedent governing the limitation of petitioner's action. Rather, the Court found the district court decisions upon which petitioner purports to have relied[14] to be incon-

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[14] *Ware* v. *Colonial Provision Co., Inc.*, 458 F.Supp. 1193 (D. Mass. 1978); *Deluca* v. *Sullivan*, 450 F.Supp. 736 (D. Mass. 1977); *Holden* v.

clusive and best limited to the statutes of limitations actually considered by those courts. 619 F.2d at 106 (Appendix to petition, pp. 33a-34a.) Moreover, the Court of Appeals pointed out that this circuit has "*never indicated* that a general tort statute of limitations is automatically to be used in place of limitations contained in state statutes specifically tailored to deal with the plaintiff's cause of action." 619 F.2d at 106 (Appendix to petition, pp. 34a-35a) (emphasis added.) Indeed, the Court of Appeals noted in one public employee discharge case that the "most analogous" cause of action under Puerto Rican law was one for political discharge of employees. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 318 (1st Cir. 1978). Faced with a choice between tort and contract statutes of limitations in a recent § 1981 case, the Court of Appeals expressly declined to choose one over the other, where the plaintiff's claim would be barred under either statute and "[a]ny decision by us as to which Massachusetts statute should be incorporated into § 1981 would be premature and mere dicta." *Daughtry* v. *King's Department Stores, Inc.*, 608 F.2d 906, 910 (1st Cir. 1979). It is clear both from the Court of Appeals' own discussion of the cases in the decision from which petitioner seeks relief, and from an examination of the First Circuit and district court cases themselves, that there was no "clear past precedent" at all upon which petitioner could have justifiably relied or which the Court of Appeals could have overruled in its choice of a statute of limitations in this case. These considerations belie petitioner's characterization of the Court of Appeals' decision as one of first impression, since, as noted above at pp. 12-13, the express terms

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Boston Housing Authority, 400 F.Supp. 399 (D. Mass. 1975). In fact, before filing this petition, petitioner had never purported to rely on any cases other than *Holden*, which was the only statute of limitations case from any court within the First Circuit cited by petitioner in briefing the issue to the district court.

of Mass. G.L. c. 151B, § 4, cl. 1, in effect since 1946, "clearly foreshadowed" application of Massachusetts' six-month limitation period to petitioner's racial discrimination claim.

Although petitioner's inability to demonstrate the existence of even the first *Chevron Oil* factor in the Court of Appeals' decision in this case is sufficient to defeat his plea for nonretroactivity, it is noteworthy that both the second and the third factors are missing as well. The second guideline established by *Chevron Oil* requires consideration of "'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Chevron Oil Co.* v. *Huson*, *supra* at 107. Applying this standard it is clear, as discussed above, that the Court of Appeals' decision promotes both the policy of repose generally served by statutes of limitations as well as Massachusetts' stated interest in achieving prompt resolution of public employee personnel actions.

In contrast, the effect of the traditional retroactivity rule on petitioner is to bar only one aggrieved employee's belated litigation of his failure to be promoted over five years ago. This can hardly be the "substantial inequitable results" contemplated by this Court in *Chevron Oil* to constitute a third factor justifying prospective-only application of a decision. Petitioner's loss is a far cry from the hardships which would have affected large and diverse groups of people in *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) (cities, bondholders, and others connected with municipal utilities), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (all persons affected by elections under challenged voting laws), and which tilted the balance of equities in favor of prospective limitation in those cases. Although the Court in *Chevron Oil* did find preclusions of an individual plaintiff's claim to be inequitable, the Court there was faced with very different circumstances, both with regard to the rule announced by the judicial decision in ques-

tion and with respect to the plaintiff himself. In petitioner's case, the Court of Appeals merely applied a familiar principle of federal civil rights law by referring to a well-known and long-standing analogous state anti-discrimination remedy and limitation period. Moreover, the equities especially disfavor petitioner's position, where he forewent two separate remedies available to him under state law, a Civil Service Commission appeal under Mass. G.L. c. 31, § 2(b) and the remedies provided by the anti-discrimination statute, Mass. G.L. c. 151B, and chose to devote his time and energy to obtaining his promotion through the use of political influence, 619 F.2d at 108 (Appendix to petition, pp. 37a-38a).

Petitioner's argument for nonretroactive application of the Court of Appeals' statute of limitations decision fails to satisfy any of the guidelines established in *Chevron Oil*. There is no conflict between the Court of Appeals' decision and this Court's holding in *Chevron Oil*, especially where petitioner failed to give the Court of Appeals an opportunity to consider the issue. Petitioner's nonretroactivity argument is without merit and does not warrant the granting of his petition.

While the Court of Appeals did not reach the merits of petitioner's racial discrimination claim, respondents briefly comment upon that issue since in respondents' view, such comments may be of assistance to this Court in determining whether to grant petitioner's writ.[15]

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[15] Petitioner claims that the Court of Appeals improperly granted summary judgment for respondents as to his equal protection claim. The appropriateness of granting a motion to dismiss and/or for summary judgment on statute of limitations grounds cannot be questioned seriously. Fed.R.Civ.P. 8(c); Fed.R.Civ.P. 12(b)(6). Petitioner's insistence that there existed disputed questions of material fact is nothing more than his dissatisfaction with the record before the district court which included his own deposition testimony. That court appropriately reached the merits of petitioner's racial discrimination claim (as well as his other constitutional claims) in accordance with decisions of the Court of Appeals and of this Court. *Maiorana* v. *MacDonald*,

In the district court, petitioner argued that the appointing authority determined not to promote a sufficient number of whites to make possible the promotion of three blacks to the position of sergeant. Under his theory, petitioner claimed that he was the last white not promoted to insure the promotion of a black. The district court properly rejected this contention on the basis of undisputed mathematics in holding that "plaintiff cannot argue that the appointing authority went down the list solely to effectuate the alleged deal . . . since the lowest person on the list to be promoted was number thirty-one . . . a white man." 473 F.Supp. at 630 (Appendix to petition, p. 14a.)

Secondly, the sworn testimony comprising the record in the district court established that neither respondent took any personal action to cause a deprivation of any right, constitutional or otherwise, which petitioner might have possessed. The respondent city manager did not make the promotion decisions giving rise to this case but instead ratified the nominees for promotion chosen by the then Chief of Police who is not a party to this action. In these circumstances, petitioner's racial discrimination claim is precluded by the well-settled line of decisions holding that liability under § 1983 does not attach unless a named defendant took personal action, recklessly or in bad faith, which *caused* a plaintiff to be deprived of a constitutional right. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Spomer* v. *Littleton*, 414 U.S. 514 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Naughton* v. *Bevilacqua*, 605 F.2d 586 (1st Cir. 1979).

Thus, the inappropriateness of granting petitioner's writ is underscored both by the lack of merit to his statute of limita-

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596 F.2d 1072, 1077 (1st Cir. 1979); *Hahn* v. *Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied* 425 U.S. 904 (1976); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978) (plaintiff "may not play dog in the manger" when faced with a motion for summary judgment).

tions argument and by the express decisional law of this Court which demonstrates the ultimate insubstantiality of his racial discrimination claim.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

Massachusetts General Laws, Chapter 31.

§ 2. Certain Duties of Commission.

. . . . . .

(*b*) Hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby; provided, that no decision or action of the director shall be reversed or modified or action be taken, in case of failure of the director to act, except by three affirmative votes of the commission, and in each case the specific reasons therefor shall be stated in the records of the proceedings of the commission. Hearings on any appeal may be held before less than a majority of the commission or the chairman may assign a member or members to hold such hearings and to report his or her findings of fact and recommendations to the commission for action. An appeal from a decision determining the results of an examination shall be in writing in the form approved by the commission, and shall contain a brief statement of the facts upon which such appeal is based; provided, that no decision of the director relating to an examination mark shall be reversed and no such mark changed unless the commission finds that it was through error, fraud, mistake or in bad faith, and in each case of reversal of such decision or change in marking the specific reasons therefor shall be stated in the records of the proceedings of the commission. In the grading of the subject of training and experience in any competitive examination, no credit shall be allowed, either in the original marking of the examination, upon review of the original marking by the director, or by the commission, whether upon an appeal from the decision of the director or otherwise,

for employment or experience in the position for which the examination is held, unless such employment or experience in the position was the result of an appointment or promotion after certification from an eligible list for the position.

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MASSACHUSETTS GENERAL LAWS, CHAPTER 31.

§ 46A. Petition for Writ of Mandamus for Reinstatement of Certain Persons; Complaints May Be Filed with Civil Service Commission.

The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose office or position is alleged to have been illegally abolished under this chapter; provided, that such petition shall be filed in said court within six months next following such allegedly illegal discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, unless said court for cause shown extends the time.

If any person alleges that his employment or compensation has been affected by action of the appointing authority in failing to follow the requirements of section forty-three, he may file a complaint with the civil service commission within seven days, exclusive of Saturdays, Sundays and holidays, after the said action has been taken. Said complaint shall set forth just how the appointing authority has failed to follow the requirements of section forty-three. This complaint may be filed with the request of the said person for a hearing under the pro-

visions of said section forty-three and if it is determined by the civil service commission that the said authority has failed to follow the requirements of section forty-three and that the rights of said person have been prejudiced thereby, the said commission may order the said appointing authority to restore immediately said person to his employment without loss of compensation or other rights.

MASSACHUSETTS GENERAL LAWS, CHAPTER 151B.

§ 4. Unlawful practices.

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, age, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

. . . . . .

MASSACHUSETTS GENERAL LAWS, CHAPTER 151B.

§ 9. Construction of statute; inconsistent laws; repeals; exclusiveness of statutory procedure; civil remedies; speedy trial; attorney's fees and costs; limitation.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply, but nothing contained in this chapter shall be deemed to repeal

any provision of chapter one hundred and forty-nine which establishes standards, terms or conditions of employment which are applicable to females, section ninety-eight of chapter two hundred and seventy-two or any other law of this commonwealth relating to discrimination because of race, color, religious creed, national origin, or ancestry, and nothing contained in this chapter shall be deemed to repeal sections twenty-four A to twenty-four J, inclusive, of chapter one hundred and forty-nine or any other law of the commonwealth relating to discrimination because of age; but, as to acts declared unlawful by section four, the procedure provided in this chapter shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section. No action under this section shall be filed later than two years after the alleged unlawful practice occurred.